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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

DENNIS GROHS,

Petitioner,

vs.

GOLD BOND BUILDING PRODUCTS, a division of NATIONAL GYPSUM COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Supreme Court U.S.

QUESTIONS PRESENTED

1. In this age discrimination case did the court of appeals err in its presumption that a person in the proteced age bracket would not discriminate against someone only six years older because of age?

2. Did the court of appeals err by making inferences, presumptions and findings of fact that can only be made by the trial court?

3. Did the trial court find direct evidence of discrimination and was that finding clearly erroneous?

4. Did the court of appeals exceed its authority under Rule 52, Fed. R. Civ. P.?

5. Did the court of appeals err in requiring Petioner as part of his ADEA prima facie case to prove that he was "qualified" for the position?

6. Did the court of appeals err in its conclusion that the findings of fact of the trial court were inconsistent and therefore clearly erroneous?

7. Did the court of appeals err in making a "finding" that the man who discharged Plaintiff genuinely believed that the reasons for discharge are true?

8. Did the court of appeals decide the factual questions de novo and reverse the district court because they would have decided the case differently?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 27, amended September 29, and further amended November 2, 1988.

OPINIONS BELOW

The opinion of the court of appeals, 859 F. 2d 1283, is set out at pp. 13-19 of the Petition Appendix. The unreported order denying a rehearing, but amending the opinion is set out at pp. 25-26 of the Petition Appendix. The first order of the court of appeals amending its opinion is set out at p. 24 of the Petition Appendix. The district court's unreported decision of February 20, 1987, is set out at pp. 1-12 of the Petition Appendix.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1988, and amended on September 29, 1988. A timely petition for rehearing was filed and denied, as amended, on November 2, 1988. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULE INVOLVED

Section 4 (a) (1) of the Age Discrimination Act of 1967, 81 Stat. 603, 29 U.S.C. Section 623 (a) (1), makes it unlawful for an employer

> "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age ...."

Rule 52 (a) of the Federal Rules of Civil Procedure provides in pertinent part:

> ". . . Findings of fact, whether based on oral or documentary evidence,

> shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

STATEMENT OF THE CASE

This court has frequently emphasized to appellate courts that they are not to decide factual questions de novo, reversing any findings they would have made differently. Maine v. Taylor, 477 U.S. 131, 145 (1986); Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). In the instant case, the Seventh Circuit has defied the mandate of this court and completely retried this case on paper, making findings which are completely contrary to those made by the trial court and giving no deference to the trial court by literally ignoring the language of the district court's opinion. The

Seventh Circuit also adopted both the facts and argument of Respondent for its opinion.

On September 18, 1984, petitioner commenced this action in the United States District Court for the Northern District of Illinois. His complaint alleged that on April 29, 1983, he was discharged by his employer of 22 years because of his age.

The case was heard at a bench trial from February 17 - 20, 1987. The trial court, in an oral opinion rendered from the bench, on February 20, 1987, found that petitioner had been discharged because of his age. The district court further found this to be a non-willful violation of the Age Discrimination in Employment Act. The court's findings were made pursuant to Rule 52, Fed. R. Civ. P.

I. The trial court found that a determining factor in the discharge of Petitioner was his superior's belief that Petitioner was "old and fat." This finding was based upon witness testimony, which the trial court found credible. The Seventh Circuit discredited that finding. Instead of pointing to record evidence that would support a "definite and firm conviction that the District Court's findings are mistaken" Burger King v. Rudzewicz, 471 U.S. 462 (1985) the Seventh Circuit simply stated "This contention . . . has absolutely no support in the record." [Pet. App. 17] The Seventh Circuit ignored substantial record evidence indicating that Petitioner was discharged based upon the belief that he was old and fat.

II. The Respondent articulated, mainly through hearsay, numerous reasons for Petitioner's discharge. The trial court

found all reasons proffered by Respondent, except the new change in management style, to be pretextual. The trial court discredited the testimony of Respondent's witnesses. However, the Seventh Circuit credited all of that testimony in its opinion. The trial court's judgment as to damages was entered on March 19, 1987. The damages awarded are undisputed.

III. The Seventh Circuit (1) reweighed the evidence, (2) adopted Respondent's facts and argument as its opinion, [1] and (3) reversed the trial court's findings as clearly erroneous on on the grounds that they were inconsistent. The appellate court found that Petitioner was no longer qualified for his position as Board Plant Superintendent because of his "deficient"

1/ The Seventh Circuit's Opinion bears a striking resemblance to the main brief submitted by Respondent. [Pet. App. 20 - 23]

labor relations skills. [Pet. App. 17] This contradicts the trial court's finding that Petitioner was not given a chance to adapt to Respondent's new management style because, as the trial court found, the Petitioner was too old and expendable. The Seventh Circuit's holding that Petitioner had not proved a prima facie case because he was no longer "qualified" for his position is in direct conflict with the holding of the 5th Circuit in Bienkowski v. American Airlines, 851 F. 2d 1503 (5th Cir. 1988).

IV. The court of appeals found that it was unlikely that the man who discharged Petitioner would have thought him to be too old because Petitioner was only six years his senior. [Pet. App. 18] The presumption that a person would not discriminate against another person in the same protected group is in direct conflict with the Court's decision in

Castaneda v. Partida, 430 U.S. 482 (1977). This erroneous presumption will have an adverse effect upon future age discrimination cases in the Seventh Circuit and elsewhere.

V. The appellate court concluded that age discrimination was unlikely because one of the new supervisors was only five years younger than Petitioner [an erroneous statement] and another "new" supervisor [also an erroneous statement] was two years older than Petitioner. [Pet. App. 18] This Court, in Anderson v. Bessemer City, supra held that a determination such as this is to be made by the the trial court and not the court of appeals.

VI. The appellate court concluded that the trial court's findings of fact were inconsistent and were therefore clearly erroneous. The findings of the trial court were consistent.

VII. The appellate court concluded that the trial court erroneously found pretext based upon events which were remote in time. The appellate court ignored the trial court's determination not to credit the testimony.

The court of appeals substituted its own judgment as to what the outcome of this case should have been and reversed the trial court. In doing so, it misapplied and misapprehended the "clearly erroneous" standard set forth by this Court in Rule 52. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. Anderson, supra, at 574.

A timely petition for rehearing and suggestion for rehearing en banc was denied on November 2, 1988.

STATEMENT OF THE FACTS

Petitioner, Dennis Grohs ["Grohs"], was employed by Respondent, Gold Bond Building Products ["Gold Bond"] for more than 22 years in its Waukegan, Illinois, plant. On April 29, 1983, Grohs was abruptly discharged by Mike Ward ["Ward"] for "not not getting along with his peers." [Pet. App. 108-109] 2/ Grohs filed a charge of age discrimination with the EEOC and in 1983, Gold Bond informed the EEOC that Grohs had been discharged for various inflammatory reasons, including sexual harassment and fondling his genitals. [Pet. App. pp. 27 & 37] 3/ During the 3 1/2 day trial Gold Bond produced additional reasons for discharging

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2/ When he was discharged nothing was said to Grohs about problems getting along with his employees. [Pet. App. 109-109]

3/ The trial court found that Respondent had "dredged" up these accusations to come up with a list for the EEOC. [Pet. App. 8]

Grohs, including accusations that he had referred to black employees as "boys" and "niggers;" he had not properly maintained certain equipment; and that he was the cause of sabotage in the plant. [Pet. App. 88-89]

Grohs denied the allegations against him. He contended that Gold Bond had directed him to be a strict supervisor. Grohs testified that when Byron Bowers, the Plant Manager, promoted him to Board Plant Superintendent in 1979, he told him to "knock some heads together" because the employees were lax. 4/ [Pet. App.105-106] Grohs was strict with his employees, but that was what management expected of him at the time. Gold Bond's policy was

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4/ There were drug problems, attendance problems, safety problems, morale problems, and unskilled employees who did not care about their work in the Board Plant. [Pet. App. 90, 91, 105, 106]

strict supervision of its employees. [Pet. App. 102-105] Better employer-employee relations did not become a company policy until late March, 1983. [Pet. App. 43]

In February, 1982, Gold Bond shut down its Waukegan plant temporarily and laid off or transferred all its employees, with the exception of Grohs and three other supervisors, who remained as custodians of the plant. [Pet. App. 30] In April, 1983, Gold Bond reopened the plant with the intention of starting it up again for a 90 day trial period and attempting to decertify the union. To aid in its decertifications efforts, Gold Bond decided to make a change in its management style and to adopt a "caring and sharing" attitude toward the new employees [Pet. App. 58 - 59] The trial court found that this meant that management would stroke the workforce a little more than in the past. [Pet. App. p. 3] Only 1 out of 71 union

members was recalled. This was a new policy to to be followed by all supervisors at the start up of the Waukegan plant. [Pet. App. 63]

Grohs had always strictly adhered to company policy in the past. 5/ Thomas Lynch, attorney for Gold Bond who approved of and participated in Grohs' discharge, testified that management at Gold Bond presumed that Grohs would have attempted to comply with the new policy, but that he would not have been successful. [Pet. App. 63] Thus, he was discharged. The remaining supervisors, ages 31, 33, 41, and 43 were also expected to adopt this new management policy.

The trial court found that Robert Sarvis, Ward's direct supervisor, had

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5/ Grohs always gave his 100% cooperation to management. He was loyal and a team player. Grohs strictly followed Gold Bond's policies. [Pet. App. 92, 102 & 105]

leaned on Ward to discharge Grohs after observing Grohs at the Waukegan plant because Sarvis thought that Grohs was not "salvagable." [Pet. App. pp. 54 & 40] Sarvis felt that Grohs' colleague, Murray Qualls, age 41, was "salvagable," but not at the Waukegan plant. Sarvis leaned on Ward to discharge [not transfer] Grohs. [Pet. App. 83]

REASONS FOR GRANTING THE WRIT

I

A. THE TRIAL COURT'S FINDING THAT SARVIS WANTED GROHS DISCHARGED BECAUSE HE WAS OLD AND FAT IS NOT CLEARLY ERRONEOUS

In his oral opinion, District Court Judge James Moran, made the following factual finding of discriminatory intent:

> "Sarvis testified that Spitz referred to Plaintiff as "old and fat." I don't find Sarvis a particularly credible witness. I must say that when he said that, I thought to

> myself: I think Mr. Sarvis is verbalizing something that he thought back at the time all this happened in 1983. Certainly, on the basis of Mr. Ward's testimony -- and in that sense, I believe that -- that Sarvis leaned on him a little bit to get rid of Grohs." [Pet. App. 6]

The trial court found that Robert Sarvis, Ward's direct superior, leaned on Ward to discharge Grohs because Sarvis thought Grohs was old and fat. Ward did discharge Grohs shortly afterward. The Seventh Circuit disagreed that this was a "finding" that age was a factor in Grohs' discharge:

> "The district judge opined that 'Sarvis leaned on [Ward] a little bit to get rid of Grohs." Plaintiff improperly characterizes this as a finding by the district court that Sarvis himself was the discriminator. This contention, however, has absolutely no support in the record." [Pet. App. 17]

Grohs may prove age discrimination by persuading the court that a discriminatory reason more likely motivated the employer. Texas Department of Community

Affairs v. Burdine, 450 U.S. 248, 256 (1981). Employment discrimination cases in particular often involve sensitive and difficult issues of fact. U.S. Postal Service v. Aikens, 460 U.S. 711, 716 (1983) The trial court made its finding based upon witness testimony and inferences from other facts. The appellate court rejected that finding and inexplicably concluded that there was no support in the record. "Findings as to the design, motive, and intent with which men act [are] peculiarly factual issues for the trier of fact and therefore subject to review under Rule 52." Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982). The record evidence is as follows:

Robert Sarvis was employed by Gold Bond as Managing Director. On March 28, 1983, Sarvis took over additional responsiblity for the Waukegan plant, and seven other plants. [Pet. App. 43, 110, 111]

During discovery Sarvis was named by Gold Bond as a person with substantial knowledge of the relevant facts. [Pet. App. 64,64a] Ward described the start-up of any Gold Bond plant as "lean and mean." [Pet. App. 80 - 81] Ward testified that he was told by Sarvis that the start up of the Waukegan plant would be challenging and a very lean type of approach. [Pet. App. 81] The start up of the Waukegan plant was "lean and mean" because the plant was to be minimally staffed. [Pet. App. p. 55] This meant that the supervisors were required to work long hours during the start up. [Pet. App. 120]

Sarvis testified that "We were looking for supervisors who had on line experience, who knew how to operate the facility. We were looking for, I would say, "young" supervisors who could grow with the operation if we were able to put it on line and keep it operational." [emphasis added.] [Pet. App. 46]

Sarvis testified that his supervisor, Bob Spitz, told him that he wanted to "get rid of" Grohs because he was "too old and too fat for the job" and he "wanted him terminated." [Pet. App. 49] Sarvis testified to a conference call between himself, Jim Bavis, Vice President of Human Resources, Ward and Spitz wherein Spitz told Ward to discharge Grohs. [Pet. App. 50] The trial court did not find Sarvis to be a "particularly credible witness." [emphasis added] 6 / The trial court, however, credited Sarvis' motives if not his words. 7 / "The law often obliges finders of fact to inquire

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6 / Sarvis had been discharged by Spitz and criminally charged with receipt of stolen property and theft. Spitz testified against him at the trial. Sarvis was acquitted. Grohs obtained Sarvis' last known address from Gold Bond by filing a motion to compel.

7 / The trial court did credit Sarvis' testimony concerning the start up. [Pet. App. 50, 51, 53, 44, 45, 46, 47]

into a person's state of mind." U.S. Postal Service Bd. of Govs. v. Aikens, supra, at 716. A man's state of mind at a particular time is as much of a fact as anything else. Id. at 716-717.

Sarvis testified that after he and Spitz had made a tour of the Waukegan plant "Spitz" wanted Grohs terminated, as well as another supervisor, Murray Qualls [age 41]. [Pet. App. 48] Gold Bond impeached Sarvis' testimony by presenting Spitz who denied visiting the Waukegan plant with Sarvis. [Pet. App. 112-113] Bold Bond also presented Jim Bavis, attorney and former Vice President of Human Relations for Gold Bond. Bavis testified that Sarvis phoned him on April 14, 1983, just after he had visited the Waukegan plant, and expressed concerns about Grohs. [Pet. App. p. 65-66] Bavis took notes while he spoke to Sarvis. Those notes, which were admitted into evidence, indicate:

> "Look especially at Dennis Grohs - concerns re his people abilities. Give Bob [Spitz] my opinion. The other two look pretty good. [Referring to Dave Burks, age 33, and Jerry Orrick, age 31.] Murray may be salvagable, but not at Waukegan. Discuss this with Mike [Ward] so he will understand." [Pet App. 40]]

Bavis' notes demonstrated that Sarvis, not Spitz, wanted Grohs and Murray Qualls out. [The trial court found that Spitz who was Vice President of Manufacturing, was too high up to be concerned with the discharge of Grohs.] [Pet. App. 5] Bavis' notes also corroborate the fact that Sarvis, not Spitz, thought Grohs was old. The notes can be read to infer the fact that Sarvis felt that Grohs was not "salvagable." Sarvis made this determination solely upon the way that Grohs appeared when he visited the Waukegan plant once. Upon cross examination by Gold Bond's attorney, Sarvis denied involvement in Grohs discharge, but he defined

"involvement" as "making an evaluation of the individual, looking at his record." Sarvis knew nothing about Grohs except the way he appeared - old and fat. Upon cross examination Sarvis testified that at the time of Grohs' discharge he was not familiar with the operations there because he had recently assumed responsibility for the Waukegan plant. [Pet. App. 53] Ward, age 48, was chosen to head the start up of the Waukegan plant by Spitz - not by Sarvis. [Pet. App. 50] Ward testified that before he discharged Grohs: "He [Sarvis] cautioned me about the "old" type of people that had been in the plant." [emphasis added] [Pet. App. 82] "He [Sarvis] cautioned me about Dennis Grohs, a supervisor in the plant." [Pet. App. 83] Sarvis cautioned Ward shortly after Ward arrived at the Waukegan plant on April 13th. Grohs was discharged on April 29th.

Ward testified that "[H]e [Sarvis] agreed with my decision wholeheartedly." [Pet. App. 89]

At the trial Sarvis testified that he was 42, thus he was 38 years old at the time of Grohs discharge. [Pet. App. 41] Sarvis was not a long time employee of Gold Bond, as the other witnesses were. He had been employed for 4 1/2 years when Grohs was discharged. [Pet. App. 42] Unlike the other production supervisors, he was well educated and articulate. The trial judge witnessed his demeanor, which included his physical appearance. "The credibility of witnesses is often crucial." Christie v. Foremost Insurance Company, 785 F. 2d 584, 586 (7th Cir. 1986). "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in

what is said. Anderson at 564 U.S. at 575. In Anderson this Court acknowledged the important and sensitive role of the trial court:

> "Even the trial judge, who has heard the witnesses directly and who is more closely in touch than the appeals court with the milieu out of which the controversly before him arises, cannot always be confident that he "knows" what happened. Often, he can only determine whether the plaintiff has succeeded in presenting an account of facts that is more likely to be true than not. Our task - and the task of the appellate tribunals generally - is more limited still: we must determine whether the trial judge's conclusions are clearly erroneous."

There was sufficient evidence for the trial court to conclude that Sarvis was the discriminator. Sarvis had only been in charge of the Waukegan plant for 30 days when Grohs was discharged. Sarvis took one look at Grohs, did not review his record, or make any evaluation of him except that he was "old and fat" and not "salvagable." The word salvagable

connotes age discrimination. When Sarvis testified that "Spitz" wanted Grohs and Murray Qualls discharged - Grohs because he was "too old and too fat for the job," the trial court credited this belief to Sarvis. The evidence presented - that it was in fact Sarvis who wanted Grohs fired and Qualls transferred - coupled with Sarvis' use of the word "salvagable" - could be interpreted by the trial court to mean that that Sarvis thought Grohs was old and fat.

The start up of the Waukegan plant was to be a challenge for the supervisors who would be required to work long hours. Sarvis believed that Grohs was too old for the job. Sarvis cautioned Ward about the "old" people at the plant, but he only cautioned him about Grohs.

Based upon the above evidence, the trial court found it more likely than not that Sarvis leaned on Ward to discharge

Grohs because Sarvis thought Grohs was old and fat, thus his age was a determining factor in Grohs' discharge. This finding is supported by the evidence. Even if the record provides only thin support for the trial court's finding, it should be upheld. Hagge v. Bauer, 827 F. 2d 101, 108 (7th Cir. 1987).

It cannot be said that the interpretation from the above facts that Grohs was discharged because he was old and fat is illogical or implausible. Therefore, it is not clearly erroneous, Anderson, at 577, and the opinion of the Seventh Circuit should be reversed..

B. THE SEVENTH CIRCUIT ERRED IN ITS PRESUMPTION THAT A MAN WOULD NOT THINK THAT SOMEONE SIX YEARS HIS SENIOR WAS TOO OLD

In its opinion the Seventh Circuit stated that Ward thought Grohs was 54 and not 51 at the time he was terminated

" . . . it thus seems unlikely that Ward thought someone even six years his senior was too old." [Pet. App. p. 18] This presumption of lack of discriminatory intent is at odds with this Court's holding in Castaneda v. Partida, 430 U.S. 482 (1977). In Castaneda the district court held that a prima facie case of discrimination against Hispanics in the selection of grand juries could be rebutted by evidence that a majority of the jury commissioners were Mexican-Americans. This Court reversed, holding that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." 430 U.S. at 499.

In his concurring opinion Justice Marshall stated: "Social scientists agree

that members of minority groups frequently respond to discrimination and prejudice by attempting to dissasociate themselves from the group, even to the point of adopting the majority's negative attitudes toward the minority." 430 U.S. at 503.

The Seventh Circuit did not listen to or observe Mike Ward. Instead, it made a legal presumption that a member of the protected age bracket is unlikely to discriminate against another member of that age bracket who is close in age. This erroneous presumption will have a devastating impact upon age discrimination cases, which are very difficult to prove. If this presumption is allowed to stand, age discrimination cases will be doomed to fail in the Seventh Circuit, and possibly in other circuits.

C. THE FACTS FOUND BY THE TRIAL COURT ARE NEITHER INTERNALLY INCONSISTENT NOR CLEARLY ERRONEOUS

The Seventh Circuit reversed the decision of the trial court as clearly erroneous on the grounds that the district judge:

(a) found that Gold Bond's stated reasons to justify Grohs' discharge were a "laundry list" or a "pretext list"; [Pet. App. 15]

(b) erroneously based its pretext finding on events which were remote in time to the discharge by failing to take into account that this information was the most recent concerning Grohs' supervisory performance which was available; [Pet. App. 17]

(c) found Grohs to be a "head knocker," deficient in labor relations skills and that his personality did not fit in with the "new" image of the company; [Pet. App. 16]

(d) found that Gold Bond had adopted new "softer supervision" policies to which Grohs did not conform; [Pet. App. 19] and

(d) found that his lack of supervisory abilities was a factor in his dismissal. [Pet. App. 18]

Based on the above, the Seventh Circuit reversed on the ground that the court's findings were internally inconsistent. The court of appeals held that the trial court's finding that Grohs' supervisory style was that of a head knocker and the finding that Grohs did not conform to Gold Bond's new softer supervision polcies did not fit with his finding of pretext. [Pet. App. 19] The court of appeals thus held that Grohs was not qualified to continue his employment as a supervisor and lack of qualification was not a pretext for firing him because of his age. [Pet. App. 18-19]. This is not what the trial court found.

The trial court's findings are as follows:

(a) that traditionally Gold Bond educated its managers, and they were direct, strict, and somewhat rough around the edges. Grohs fit into that mold. [Pet. App. p. 4]

(b) that Grohs was a strong, able, experienced, supervisor, who was strict,

not terribly flexible, a tough boss and a head knocker at times. But that was the role his employer wanted him to play - until the plant reopened. [Pet. App. p. 5]

(c) that at the start up of the plant management wanted supervisors who would not unduly upset the work-force. [Pet. App. p. 6]

(d) Grohs was the type of supervisor that Gold Bond had raised him to be. However, that type of super-visor - a head knocker - did not fit in with the new management style. [Pet. App. p. 6]

(e) that despite the fact that Grohs was a strong performer, with over 20 years with the company, Gold Bond felt that he was expendable. [Pet. App. pp. 6, 7]

(f) that if Grohs was younger, Gold Bond would have sought to teach him new tricks to the limited extent they were necessary, or, to transfer him. [Pet. App. p. 7]

(g) The court rejected as pretext the numerous reasons proffered by Gold Bond to show that Grohs' labor relations were a "disaster." [Pet. App. p. 7-11]

(h) In describing Gold Bond's proffered reasons as a "pretext list" the trial court found them to be not only remote in time, but the Court also questioned if each event had occurred. [Pet. App. pp. 7-11] The trial court did not find the proffered reasons to be true, as

the Seventh Circuit contends.

(i) The court found that during the shutdown Grohs was sent elsewhere by Gold Bond to train people. [Pet. App. p. 5] The most recent information concerning Grohs was after and not before the shutdown of the plant, as stated by the Seventh Circuit.

After reweighing the evidence, the Seventh Circuit found that "Grohs' personality did not fit in with the 'new' image or strategy of the 'new' company" [Pet. App. 16]; that the "company had implemented new supervisory standards requiring 'skill' in labor relations" [Pet. App. p. 17]; that Grohs had "deficient labor relations skills" [Pet. App. 17]; that Grohs' "lack of supervisory abilities was a factor in his dismissal" [Pet. App. 18]; and that "Gold Bond could find that he was no longer qualified and discharge him." [Pet. App. 7] The court of appeals held that Gold Bond's belief that Grohs was no longer qualified

to be a supervisor, if genuinely held, "cannot be a pretext for firing Grohs on account of his age." [Pet. App. p. 18]

The trial court did not find Grohs to be lacking skill in labor relations. The court found that managers of Gold Bond were direct, strict, somewhat rough around the edges, without particularly sophisticated educational backgrounds and Grohs fit into that mold. [Pet. App. p. 4] This finding was based upon observation of and testimony from Grohs, and four other supervisors, Robert Coventry, Murray Qualls, Robert Spitz and Mike Ward. These men had all worked their way up to management positions after spending many years working for Gold Bond.

The trial court found that the company had evaluated Grohs to be a strong, able, experienced board plant superintendent; quite clearly strict, not terribly flex-

ible, and, when he thought it necessary, a head knocker at times, and a tough boss. [Pet. App. 4]

Grohs testified that prior to the shutdown when he was Board Plant Superintendent, Gold Bond's policies in dealing with its employees were very strict and Grohs strictly followed company policy. [Pet. App. 103, 105] Jon Roth, the former union president testified that the union, during contract negotions in 1981, complained about the strict company policies and wanted them changed. Gold Bond's response was that they would remain. [Pet. App. 117, 118, 119]

As Mill Superintendent, Grohs evaluation in August, 1979, indicates that he was "very professional in his approach to personnel. No grievances in 1978, [none in] 1979. Very strong in this area." [Pet. App. 33] In November of 1979, Plant Manager Byron Bowers promoted Grohs

from Mill Superintendent, where his labor relations were very good, to Board Plant Superintendent. Grohs was instructed to knock some heads together.

> Q. At the time that Byron Bowers appointed you, did you have a conversation with him?
>
> A. Yes, I did.
>
> Q. Where did it take place?
>
> A. In his office.
>
> Q. What did he say?
>
> A. He said that we needed a little discipline in the board plant. He said we needed to start knocking some heads together is what he said. [Pet. App. pp. 105-106]

Grohs' direct supervisor prior to the shutdown, Robert Coventry, testified that Grohs was "extremely loyal" and "a good company man." [Pet. App. 92] He was "a strong supervisor, good leadership." [Pt. App. 93] In Grohs' 1981, peformance appraisal Coventry wrote: "Needs to establish uniform departmental procedures

and labor relations actions." [Pet. App. 38] He explained that Grohs, as well as every supervisor in the plant, was inconsistent in his labor relations approaches. [Pet. App. 100] Coventry described Grohs' labor relations as follows:

> ". . . He was a little rough at people. He had short shrift for a man he felt was not doing his job, not interested in his job. He would speak brusquely, give them a little attention. But a man who needed help and was a good employee, I felt he was almost paternalistic." [Pet. App. p. 93]

Q. Did Dennis have people problems?

A. I don't think so. Problem people. [Pet. App. p. 94]

Q. How did Dennis do with respect to labor relations when he was the mill superintendent?

A. His relations were excellent. It's a small department, I believe 10 men a slow moving department where there was time for him to get around and talk to his men. He knew them all and had lots of opportunity to guide them and train. I think he did an excellent job.

Q. What is the difference between the board plant then?

A. Board plant is 39 or 40 people with three foremen, a high-speed operation

with instant variations requiring good reaction.

Q. Mr. Coventry, could you tell me, when Dennis worked under you, where did labor relations fall in his list of priorities?

A. As far as management by objectives, the objective sheet that we prepared, it was not in the leading areas of responsibility. It was an area of responsibility, but it took a back seat to the management objective which we listed each year. [Pet. App. 95, 96]

Coventry testified that Grohs' labor relations responsibilities were to develop a uniform system of discipline among the employees because the collective bargaining agreement did not provide for one. [Pet. App. 93, 94]

Q. Now, you said you were working him on this system of discipline. How was he doing?

A. He was trying to do a good job. He had three foremen, and he, in turn, had to pass this onto them as well as curing a few of his own natural inclinations or experiences in a natural way of performing. He was making progress, doing fine. I was satisfied with what he was doing. [Pet. App. 94-95]

Coventry testified that Grohs had improved the morale of the employees in the board plant. [Pet. App. 98-99]

Based upon the above, the trial court found that Grohs'supervisory style was the role that his employer wanted him to play until the plant reopened. [Pet. App. 5]

In 1980 Grohs was evaluated by Plant Manager, Byron Bowers, as "Competent, but very close to outstanding." [Pet. App. 36] Bowers indicated "Dennis has worked very hard to improve board plant performance. He is weak in labor relations but is working to improve this area." [Pet. App. 36] Grohs testified that Bowers told him that he was very pleased with his efforts in the board plant and he wanted to give him an outstanding rating, but for certain reasons he could not. Bowers told Grohs that he had to put down a weakness because he had given him a competent

rating, so he wrote down labor relations. [Pet. App. 106a & 106b] Bowers gave Grohs a good raise in 1980.

In August, 1981, Grohs was evaluated by Plant Manager, Tom Brooks as "Strong Competent." Brooks stated "Has done a very good job of manufacturing a quality product." Brooks further stated that Grohs had "improved in labor relations, but still needs a little finesse." [emphasis added] [Pet. App. 38] Brooks told Grohs that he was very happy with the job Grohs had done and he gave him a good raise. [Pet. App. 106c] Robert Coventry, Grohs supervisor, testified that Brooks did not feel that Grohs had problems in labor relations. [Pet. App. 97a]

A short time after his 1981, evaluation, Grohs survived two layoffs and was one of four supervisors retained at the Waukegan plant when it shut down in February, 1982. Brooks chose to retain

Grohs based upon his peformance evaluations and his versatility. [Pet. App. 62]

Bob Coventry testified that Tom Brooks, was well pleased with Grohs up to the time the plant was shut down:

> Q. Did Mr. Brooks ever complain to you about Dennis's relationships with the hourly employees?
>
> A. No. I feel Mr. Brooks was satisfied with Dennis's performance and the way he approached it.
>
> Q. Did he ever complain about Dennis's relationship with the supervisory employees to you?
>
> A. No, I can't remember anytime.
>
> Q. When you left Waukegan, did Tom Brooks make any negative remarks about Dennis to you?
>
> A. He did not, no. At that time when I left, I believe fully that Tom was satisfied with Dennis's work.

Even Mike Ward, who discharged Grohs, admitted that on paper it appeared that Grohs had done a good job as Board Plant Superintendent. [Pet. App. p. 78]

On his last day at the plant Tom Brooks told Grohs that he would arrange to have him take a Human Relations Course. 8/ Brooks also gave Grohs a very good raise. [Pet. App. 123]

The Waukegan plant shut down in February, 1982. Ward was aware that during the shut down Grohs was sent to Medicine Lodge, Kansas, to train new employees for that start up of the plant. Medicine Lodge was one of the biggest of all Gold Bond's plants. [Pet. App. 56] Waukegan was the smallest start up. [Pet. App. 56] Murray Qualls, Grohs' supervisor during the shut down of the Waukegan plant, testified that management

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8/ In mid-1981, Grohs had taken a Techiques in Hiring seminar in Madison, Wisconsin, with two other supervisors from the Waukegan plant. [Pet. App. 123] Brooks did not arrange the course for Grohs.

at Medicine Lodge was very pleased with Grohs. [Pet App. 101] Grohs trained and supervised employees at Medicine Lodge. [Pet App. 107] Grohs even relieved the Board Plant Foreman and Board Plant Superintendent when they took their vacations. [Pet. App. 107] Grohs' help was repeatedly requested by management at Medicine Lodge. [Pet. App. 107a] The start up of the Waukegan plant would have required the supervision and training of new employees, exactly as Grohs had done at Medicine Lodge, except that the the supervision would be a little softer at the Waukegan plant to achieve decertification of the union.

The trial court did not find that labor relations "skill" was required under the new management style. Rather, the court stated that "management would stroke

the new work force a little more than had previously been the practice" [Pet. App. 6] and the company wanted "supervisors who would not upset the hourly employees unduly." [Pet. App. 6] This finding was supported by the evidence. Mike Ward was given a 90 day trial period to resurrect the Waukegan plant. His mission was to keep the union out during those 90 days. [Pet. App. 69] He wanted his supervisors to be "tuned in" to labor relations. [Pet. App. 70] One of his primary objectives was to foster good labor relations among the employees. [Pet. App. 71]

Contrary to the Seventh Circuit's holding [Pet. App. 18] the trial court did not find that "lack" of supervisory "abilities" was a factor in Grohs discharge. The trial court found that Grohs had a strong record [Pet. App. 6]

and that he was the kind of supervisor Gold Bond had raised him to be. [Pet. App. 6]

The issue here is not one of "qualification" for the job, but that of a change in policy. When Gold Bond decided to start up the Waukegan plant it determined that its "labor relations policies" were responsible for the deterioration of the plant. [Pet. App. 28] The issue is whether the remaining supervisors at the Waukegan plant, Jerry Orrick, age 31, Dave Burks, age 33, Murray Qualls, age 41, and Jon Roth, age 43, were given the chance to adapt to the new policy of softer supervision. Orrick, Burks and Qualls were among the supervisors prior to the shutdown who were inconsistent in their labor relations. [Pet. App. 100] Yet, Grohs, age 51, was discharged.

The court found that Gold Bond did not want to take a chance with Grohs; he has been set in his ways too long [ways taught him over 22 years by Gold Bond]; he is too old and he is expendable. [Pet. App. 11] Coventry testified that Grohs was a good company man, who cooperated 100% with management. [Pet. App. p. 92] Thomas Lynch, who approved of Grohs' discharge, testified that Grohs' loyalty was never questioned by Gold Bond. [Pet. App. 57, 58]

Jim Bavis, Gold Bond's Vice President of Labor Relations, talked to all of the supervisors at the Waukegan plant, including Grohs, about the new plan and the need for more understanding between supervisors and the employees. [Pet. App. 63] Lynch testified that Grohs, being a company man, would have attempted

to go along with the company's program, but he did not think Grohs would have been successful. [Pet. App. p. 63]

Ward confirmed this:

Q. Now on the day that you fired Dennis, you didn't even consider letting him stay on as a security guard, did you?

A. No.

Q. You just wanted him out?

A. That's correct.

Q. You didn't put him on probation?

A. No.

Q. You didn't transfer him to another facility?

A. No.

Q. You didn't give him a chance?

A. I discharged him.
[Pet. App. p. 77]

With respect to transferring Grohs, Lynch acknowledged that the termination of a long-term employee is an important matter. [Pet. App. 124] Bavis testified that managment considered hiring Jon Roth

[age 43] in a plant other than Waukegan because his "human relations skills are less than polished." Roth was retained in Waukegan. [Pet. App. 125] Bavis' notes indicate that Sarvis wanted to transfer Murray Qualls [age 41] from Waukegan. [Pet. App. 40] Qualls was also retained. Grohs, age 51, was neither transferred, nor retained.

The trial court found that Gold Bond did not seek to teach an old dog new tricks to the limited extent that they were necessary. [Pet. App. p. 7] For the past 22 years Grohs had strictly followed company policies and had become a head knocker. When those policies changed, Gold Bond did not believe that Grohs could adapt to those new policies because he was too set in his ways. This supports a finding of age discrimination.

D. THE HOLDING OF THE SEVENTH CIRCUIT THAT PETITIONER HAD NOT PROVED A PRIMA FACIE CASE BECAUSE HE WAS NOT QUALIFIED FOR HIS JOB IS ERRONEOUS

In McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973) this Court first set out a method of proving discrimination where there was no direct evidence of discrimination. McDonnell-Douglas was never intended to be rigid, mechanized or ritualistic. Rather, it is merely a sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical issue of discrimination. U.S. Postal Service v. Aikens, supra. McDonnell-Douglas was a hiring case. Unlike hiring cases, in which the issue is whether the plaintiff was qualified for the job, the issue in discharge cases is whether the person in the protected age category was

performing his job at a level that met the employer's legitimate expectations. This modification of the McDonnell-Douglas formula was first set out in Loeb v. Texetron, Inc., 600 F. 2d 1003, 1014 (1st Cir. 1979).

The Seventh Circuit has held that in order to establish a prima facie case an ADEA plaintiff must show:

(1) that he belongs to the protected class;

(2) that his job performance was sufficient to meet his employer's legitimate expectations;

(3) that he was discharged in spite of his performance; and

(4) that the employer sought a replacement for him.

Dale v. Chicago Tribune Co., 797 F. 2d 458 (7th Cir. 1986); Mathews v. Allis-Chalmers, 769 F. 2d 1215, 1217 (7th Cir. 1985); LaMontagne v. American

Convenience Products, Inc., 750 F. 2d 1405, 1409 (7th Cir. 1984). The Seventh Circuit did not apply this formula, but the formula for a hiring case - that Grohs must demonstrate that he was qualified for the job - in the instant case.

The formula utilized in the Fifth Circuit also requires an ADEA plaintiff to prove that he was qualified for the job. However, in Bienkowski v. American Airlines Inc., 851 F. 2d 1503 (5th Cir. 1988) the court held that for purposes of the prima facie in order to show he was qualified the plaintiff must show that he continued to possess the necessary qualifications at the time of the adverse action. The court defined this to mean that the plaintiff had not suffered any physical disability or loss of a necessary professional license or some other

occurrence that rendered him unfit for the position for which he had been hired. 851 F. 2d at 1506.

Citing Halsell v. Kiberly-Clark Corp., 683 F. 2d 285, 291 (8th Cir. 1982) the Fifth Circuit cited the intent of this Court in establishing a formula to draw an inference of discrimination which the Seventh Circuit seems to have forgotten:

> "The concept of "the prima facie case" outlined in McDonnell Douglas means only that the Plaintiff has produced enough evidence to shift the burden of production to the defendant." [851 F. 2d at 1505 n. 1]

The Seventh Circuit in the instant case has imposed an onerous burden on the ADEA plaintiff in proving a prima facie case. This was not the intention of this Court in creating the prima facie case. If the opinion of the Seventh Circuit is allowed to stand, defense attorneys in this circuit will

be successful in dismissing ADEA cases on motions for summary judgment. As the Fifth Circuit states, "the lines of battle should be drawn over the employer's articulated reason for its action and whether that reason is a pretext for age discrimination." [851 F. 2d at 1506] This rationale is consistent with the intent of this Court.

E. THE SEVENTH CIRCUIT, IN ITS FINDING OF LACK OF DISPARATE TREATMENT, ERRED AND SUBSTITUTED ITS JUDGMENT FOR THE TRIAL COURT

The Seventh Circuit's opinion states:

> "There is insufficient proof of disparate treatment, especially in light of the fact that Ward is only three years younger than Grohs, one of the new supervisors is merely five years younger, one is fifteen years younger, and the other is actually two years older. 4"

Footnote 4 states:

> "At the time he terminated Grohs, Michael Ward was 48 years old, three years younger than Dennis Grohs. The three men who were hired as new supervisors after Grohs' dismissal were aged 36, 43, and 53."
> [Pet. App. 16]

The Seventh Circuit misapprehends and misapplies the concept of disparate treatment. In this case, as stated above, the disparate treatment is the change of policy and the refusal of Gold Bond to take a chance with Grohs, age 51, because he is too set in his ways. Gold Bond did take a chance with its younger supervisors employed at the time of Grohs' discharge: Jerry Orrick, age 31, Dave Burks, age 33, Murray Qualls, age 41, and Jon Roth, age 43. [Pet. App. 61] Each of these men was required to adapt to the new company policy. Grohs, who had strictly followed company policy in the past, was discharged.

Herman Fraley, age 34 [not 36 as stated by the Seventh Circuit], was promoted to Board Plant Superintendent and transferred to the Waukegan plant on September 1, 1983 - three months after Grohs was discharged. [Pet. App. 31-32]

The last "new" supervisor, Junior Henkle, was not so new. He was transferred into the Waukegan plant one year after Grohs was discharged and after the employees had voted to decertify the union and softer supervision was no longer needed. Junior Henkle was brought into the Waukegan plant in March, 1984, because its operation was a disaster due to inexperience of the supervisory staff. Junior was brought in because of his "years of experience." [Pet. App. 79, 80, 81] What relevance, if any, the transfer of Junior Henkle has in dispelling an inference of discrimination on the basis of age is a matter to be weighed in its consideration of bias by the trial court rather than the the appellate court. Anderson v. Bessemer City, 470 U.S. at 580 n.4

F. THE TRIAL COURT WAS CORRECT IN HOLDING THAT GOLD BOND'S PROFFERED REASONS ARE A PRETEXT FOR DISCRIMINATION

The Seventh Circuit erred in the following holding:

> "The district court characterized Gold Bond's reasons for discharging Grohs as a "laundry list" and a "pretext list." It appears to have done so in part because all of the instances of Grohs' behavior of which the company received complaints occurred two and three years before Grohs' employment was terminated. . . The most recent information regarding Grohs' supervisory performance that was available was information dating back to 1980 and 1981." [Pet. App. 17]

This is not so. Mike Ward was fully aware of the fact that during the shutdown Grohs both trained and supervised new employees at the start up of Medicine Lodge, one of Gold Bond's biggest plants, just like he would have done at the start up of the Waukegan plant. Grohs did such a good job that he was asked to return several times. See Pages 40-41, above.

Also, the trial court did not "find" that the laundry list of reasons for discharging Grohs had, in fact, occurred.

Gold Bond's proffered reasons for Grohs discharge were the following:

(1) Grohs fondled his genitals in a lewd and public manner in front of female employees prior to the shutdown. [Pet. App. 31]

This accusation was denied at the trial by Grohs, Robert Coventry, Murray Qualls, and Darlene Ramig, a female employed prior to the shutdown. Tom Brooks, who allegedly told this to Ward, did not testify although he was employed by Gold Bond. The trial court questioned if this ever happened.

(2) Grohs circulated personal rumors prior to the shutdown. [Pet. App. 31]

Grohs, Robert Coventry, and Murray Qualls all denied this accusation. Tom Brooks, who did not testify, allegedly told this to Ward. The trial court questioned if this ever happened.

(3) The employees sabotaged the equipment prior to the shutdown to get back at Grohs. [Pet. App. 85]

Robert Coventry testified about the only two instances of sabotage on the part of the employees. He had investigated the sabotage and found that Grohs had nothing to do with either instance. His testimony impeached that of Jon Roth, the former union President. The trial court believed Coventry.

(4) Grohs had called black employees "nigger" and "boy." [Pet. App. 88]

Grohs testified that he called all of the hourly employees in the board plant "boy" and when it was brought to his attention he stopped. He denied ever referring to a worker as a "nigger." The trial court believed Grohs. The court also found that no grievances were filed by Roth, despite the fact that he grievances on 50% of the complaints made to him.

(5) Grohs was hated by the hourly employees. [Pet. App. 88]

The court found that because Grohs

was expected to be a "head knocker" by Gold Bond, it was not surprising that the employees did not like him.

(6) Grohs had grabbed Becky Parkman's crotch at a supervisor's dinner. [Pet. App. 84]

This accusation was denied by Grohs, as well as Robert Coventry and Murray Qualls who were both at the dinner that night. Tom Brooks, who allegedly told Ward about this, did not testify at the trial, nor did Becky Parkman. The court questioned if it had happened.

(7) At the same supervisor's dinner in June, 1981, Grohs told Darlene Ramig, a payroll secretary, that he would help her get promoted if she would go to a motel with him. [Pet. App. 31]

Grohs admitted to having a conversation with Ms. Ramig about promotion, but denied asking her to go to a motel with him. Robert Coventry testified that he investigated this allegation for Tom Brooks and reported to Brooks that it was not true. Two months after the supervisor's

dinner, Brooks gave Grohs an evaluation rating him as "strong competent" and commenting that his labor relations had "improved." Brooks, who allegedly told Ward that it was true, did not testify at the trial. Ramig did not remember this incident at all when she was questioned by the undersigned about it in the summer of 1984, just prior to the filing of this lawsuit. The trial court did not believe that Grohs propositioned Ramig.

(8) During the shutdown, the equipment was not properly maintained by Grohs. [Pet. App. 85]

The court believed Murray Qualls testimony that he was responsible for the maintenance of the equipment during the shutdown and that the equipment had been properly maintained.

(9) Grohs spoke of Becky Parkman and Donna Bittner as lesbians at a restaurant prior to the shutdown. [Pet. App. 86]

Grohs denied this and Darlene Ramig, who was present that evening confirmed his testimony. The court did not believe it happened.

(10) Roth told Ward that Grohs was the root cause of most labor management problems at the plant and the union had repeatedly complained to management about Grohs' actions. [Pet. App. 74-75]

Roth testified that the union complaints were that Grohs was following company policy. The union complaint was against the policy and not the individual. Both Lynch and Brooks backed up Grohs and said the policy would not be changed. [Pet. App. 116-117] The trial court found that if the employees did not like Grohs, it was because he was doing what the company expected of him.

(11) Ward claimed that Donna Bittner told him prior to the shutdown, when she was a quality technician, she had tagged wallboard to be held because it was inferior. Grohs had removed tags from the wallboard and directed it to be shipped. [Pet. App. p. 72,73]

Murray Qualls, Donna Bittners' supervisor, testified that it was Grohs' job to inspect the inferior wallboard and pass judgment on whether it could be sold. Qualls testified that he and Bob Coventry sent out wallboard which had been held by Bittner. Ward knew that this was an accepted practice and Donna Bittner did not testify, despite the fact that she was presently employed by Gold Bond in the Chicago area at the time of the trial. The trial court found this to be another irrelevancy.

(12) Roth accused Grohs, when he was Board Plant Superintendent, of ignoring a call of an employee's wife who had been in an accident. [Pet. App. p. 114-115]

The trial court believed Grohs' explanation and found this to be meaningless.

G. THE DISTRICT COURT DID NOT FIND THAT WARD'S BELIEF WAS GENUINELY HELD

During the trial Grohs proved that each reason proferred by Gold Bond for his discharge was not true. Grohs demontrated a continual change of story from Ward telling him that he was fired for not getting along with his peers, to the inflammatory accusations made to the EEOC, and finally the last claims made during the trial. Grohs impeached each of Gold Bond's witnesses and its documentary evidence. The trial court questioned if the events had occurred and found them to be a pretext list. Common sense dictates that if Grohs was guilty of all that was said about him, he would not have received good evaluations in 1979, 1980, and 1981. He would not have been kept after two layoffs. He would not have been sent to train new employees at the start up of Medicine Lodge.

The Seventh Circuit rendered the findings of the trial court meaningless with its holding that "Even if the allegations about Grohs were true, Ward genuinely believed that they were." [at 1289] The trial court made no finding that Ward's belief was genuine and it was not the Seventh Circuit's role to do so.

The burden of the defendant has been succinctly stated by this Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which holds that defendant "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." at 254. Burdine further held that "[T]he defendant's explanation of its legitimate reasons must be clear and reasonably specific . . . Thus, the defendant normallly will attempt to prove the

factual basis for its explanation." at 258. During the trial Mike Ward, who discharged Grohs, testified that all of the adverse information pertaining to Grohs stemming from prior to the shutdown of the Waukegan plant came from Thomas Brooks, the Plant Manager at the time. As Ward testified to each incident about Grohs, he claimed that the information had come from Thomas Brooks. In fact, during his testimony Ward mentioned the name of Tom Brooks 53 times.

On the date of the trial Thomas Brooks was still employed by Gold Bond as Manager of its Phoenix, Arizona plant. [Pet. App. p. 76] Thomas Brooks could have corroborated Ward's testimony, but he did not testify, nor was his absence explained. Brooks' name did not appear on Gold Bond's witness list, nor was an affidavit signed by Brooks submitted in support of Gold Bond's motion for summary

judgment.

At the trial Gold Bond flew in Helen O'Dea, a custodian of records from North Carolina. [Pet. App. p. 122] Gold Bond also flew in Jim Bavis, a former employee, who testified that he had been first contacted by Gold Bond on the afternoon of the day before he testified. [Pet. App. p. 67-68] Gold Bond spent effort and money to fly in these secondary witnesses, but not the most important witness, Thomas Brooks. Gold Bond had access to and control over Brooks, since he was a currently employed high-level supervisor. This Court established long ago the "missing witness rule" which holds that if a party had a witness whose testimony is important, but chooses not to call him, then an inference arises that his testimony, if produced, would be unfavorable. Graves v. United States, 150 U.S. 118, 121 (1893). This is

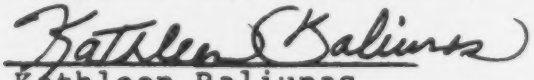
especially true in an employer-employee relationship. Chicago Col. of Ost. Med. v. Fuller, 719 F. 2d 1335 (1983).

At the trial Grohs impeached Gold Bond's witnesses. That fact and the lack of testimony from Brooks, the most important witness for Gold Bond, makes it clear that Ward's stated belief about Grohs was not genuinely held.

CONCLUSION

For the above reasons, the judgment and opinion of the Seventh Circuit should be reversed with instructions to affirm the findings of the trial court.

Respectfully submitted,



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